



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Khalida Rachid Khan, Presiding  
Lee Gacuiga Muthoga  
Emile Francis Short

**Registrar:** Adama Dieng

**Date:** 5 June 2008

**THE PROSECUTOR**  
v.  
**CASIMIR BIZIMUNGU**  
**JUSTIN MUGENZI**  
**JÉRÔME-CLÉMENT BICAMUMPAKA**  
**PROSPER MUGIRANEZA**

**Case No. ICTR-99-50-T**

**DECISION ON PROSPER MUGIRANEZA'S EMERGENCY MOTION TO  
RECALL WITNESSES FOR FURTHER TESTIMONY**

**Office of the Prosecutor:**

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Justus Bwonwonga  
Mr. Elvis Bazawule  
Mr. Shyamlal Rajapaksa  
Mr. Olivier De Schutter

**Counsel for the Defence:**

Ms. Michelyne C. St. Laurent for **Casimir Bizimungu**  
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**  
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**  
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

## INTRODUCTION

1. The Defence for Prosper Mugiraneza (“Defence”) moves the Chamber for leave to recall certain witnesses who have already testified in his case, for further evidence-in-chief.<sup>1</sup> The Defence seeks the recall of seven witnesses in total: Defence Witnesses RDA, RDC, RWE, RWZ, RWD, RDW, and RWG.<sup>2</sup> The Motion does not provide any legal or factual basis for the recall of any of the aforementioned Witnesses, rather the basis of the Defence Motion is the material contained in another motion (“Second Motion”) which the Defence filed *ex parte*, and strictly confidentially, concerning those Witnesses.<sup>3</sup>

2. The Prosecution opposes the First Motion.<sup>4</sup> It submits that the First Motion fails to disclose any basis for the recall of the Witnesses, and that it also denies the Prosecution an opportunity to respond to any arguments raised as a basis for recalling the Witnesses since the Second Motion containing any such arguments is an *ex parte* filing. The Prosecution requests that the Chamber order the disclosure of the Second Motion so as it can be afforded a proper opportunity to respond to the arguments raised therein. Alternatively, the Prosecution requests the Chamber to deny the First Motion.

3. The Defence replies to the Prosecution’s Response, noting that the Prosecution has been provided with a copy of the Second Motion by the Defence and also by the Registry, and that, therefore, the Prosecution is aware of the basis upon which the current Motion has been brought.<sup>5</sup> The Defence submits that the Chamber should consider issuing a warning to the Prosecution, pursuant to Rule 46 of the Rules, on the basis that the Prosecution has deliberately misled the Chamber. Further, the Defence submits, the Prosecution’s Response should not be considered by the Chamber.

## DELIBERATIONS

*Preliminary matters – whether to order the Disclosure of the Second Motion; whether to consider the Prosecution Response; and whether to sanction the Prosecution*

4. With respect to the Prosecution’s request for disclosure of the Second Motion, the Chamber notes that the Prosecution has in its possession a copy of the *ex parte*, strictly confidential Second Motion.<sup>6</sup> Even though the Second Motion was not legally before the Prosecution, the Prosecution had a copy of it, and therefore could have responded to the

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<sup>1</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, “Prosper Mugiraneza’s Emergency Motion to Recall Witnesses for Further Testimony” (“First Motion”), filed on 22 May 2008.

<sup>2</sup> The Witnesses testified before the Chamber on the following dates: Witness RDA on 26 February 2008; Witness RDC on 3 March 2008; Witness RWE on 19 February 2008; Witness RWZ on 28 February 2008; Witness RWD on 12 March 2008; Witness RDW on 19 February 2008; Witness RWG on 18 February 2008.

<sup>3</sup> The Second Motion was also filed on 22 May 2008, however, due to its *ex parte*, strictly confidential nature, the Chamber will not cite its title in this public document. The Second Motion was filed pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”)

<sup>4</sup> *Bizimungu et al.*, “Prosecutor’s Response to Prosper Mugiraneza’s Emergency Motion to Recall Witnesses for Further Testimony”, filed on 26 May 2008.

<sup>5</sup> *Bizimungu et al.*, “Prosper Mugiraneza’s Reply to Prosecutor’s Response to Prosper Mugiraneza’s Emergency Motion to Recall Witnesses for Further Testimony” (“Reply”), filed on 28 May 2008.

<sup>6</sup> Although the Second Motion was filed *ex parte*, the Defence for Mugiraneza provided the Prosecution with a copy of the Motion so as it would be aware of the basis upon which recall of the seven witnesses was sought – see Defence Reply, para. 2. The Registry also distributed the Second Motion to all of the Parties in the case, inadvertently.

merits of the First Motion while drawing the attention of the Chamber to the circumstances under which they were doing so.

5. Furthermore, with respect to the basis upon which the Second Motion was filed *ex parte* and assigned strictly confidential status, the Chamber will consider whether there is sufficient merit to warrant such status when it comes to decide upon the Second Motion. Lifting the *ex parte*, strictly confidential status of the First Motion at this stage, and without full consideration of the interests of the concerned Witnesses, would be contrary to the interests of justice, and to the spirit of the provisions of the Statute and Rules which afford them protection.

6. The Defence argues that the Prosecution deliberately misled the Chamber by failing to mention in its Response that it had been provided with a copy of the *ex parte* Second Motion, and was therefore aware of its contents. While the Chamber considers that the Prosecution should have been more transparent as to its knowledge of the contents of the Second Motion, it also considers this matter to have been complicated by the fact of the filing in question being *ex parte*. The Prosecution may have reasonably considered that it could not refer to the contents of the Second Motion because it was filed *ex parte*.

7. In these circumstances, the Chamber does not consider it appropriate to sanction the Prosecution pursuant to Rule 46 of the Rules. Furthermore, there is no basis for refusing to consider the Prosecution's Response.

8. Having addressed these preliminary issues, the Chamber will now turn to the merits of the First Motion for the recall of the seven Defence witnesses in question.

#### *Whether the Defence Witnesses should be Recalled*

9. Neither the Statute nor the Rules expressly provides for the recall of a witness. However, according to the consistent jurisprudence of the Tribunal, a Chamber may order recall where good cause is demonstrated by the moving party. In assessing whether good cause has been shown, Trial Chambers have considered: (i) the purpose for which the witness will testify; and (ii) the reasons why the witness was not questioned earlier on those matters.<sup>7</sup>

10. The recall of a witness should be granted only in the most compelling of circumstances where the further evidence to be given is of significant probative value, and not of a cumulative nature.<sup>8</sup> Such a compelling reason may be, for example, to explore inconsistencies between a witness' testimony before the Chamber, and a declaration obtained

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<sup>7</sup> *Bizimungu et al.*, Decision on Jérôme-Clément Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA (TC), 21 April 2008, para. 6, referring to: *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-examination (TC), 19 September 2005, para. 2; *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-examination (TC), 28 October 2004, para. 5; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonnyunkiza, 25 September 2007, para. 5. See also *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH (TC), 12 March 2008, para. 5.

<sup>8</sup> *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-examination (TC), 19 September 2005, para. 2, citing *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6, and referring to *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 14.

subsequently.<sup>9</sup> Furthermore, and as governs the admission of any evidence before the Chamber, the additional testimony to be given by the witness must be relevant and probative in relation to the allegations in the indictment which the accused has been called upon to answer.<sup>10</sup>

*The purpose for which the Witnesses will testify and the reasons why the Witnesses were not questioned earlier on these matters*

11. The Defence seeks the recall of the seven Witnesses for the purposes of them testifying on the factual matters set out in the Second Motion.<sup>11</sup> The Defence makes no further submissions at all as to why the facts disclosed in the Second Motion give rise to the need for further testimony from these Witnesses.

12. The Defence does not attempt to demonstrate the relevancy of the matters contained in the Second Motion to this case, for example, to link any of the facts disclosed in the Second Motion to the Indictment in the case; nor to argue that the testimony of the Witnesses – who have already testified before the Chamber – has been affected by the matters disclosed in the Second Motion. The Chamber notes that the matters disclosed in the Second Motion arose *after* all seven Witnesses in question had completed their respective testimonies before the Chamber. Nor is there any evidence that the testimonies of the Witnesses were affected by the facts which are disclosed in the Second Motion.

13. The Chamber considers that the Defence has clearly failed to demonstrate good cause for the recall of any of the seven witnesses in relation to whom the relief is sought.

**FOR THE FOREGOING REASONS, THE CHAMBER**

**DENIES** the Defence Motion in its entirety.

Arusha, 5 June 2008

Khalida Rachid Khan  
Presiding Judge

Lee Gacuiga Muthoga  
Judge

Emile Francis Short  
Judge

[Seal of the Tribunal]

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<sup>9</sup> *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 8:

“If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness’s explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witnesses will not be recalled.”

<sup>10</sup> See Rule 89 (C) of the Rules.

<sup>11</sup> First Motion, para. 2.